

A  
CALM APPEAL

TO THE

PEOPLE

*Charles Kean (T.)*

OF THE

*and Physick (E.)*  
*K*

STATE OF DELAWARE.

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PRINCIPIS ORTA

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JUSTICE IS THE STAFF OF PEACE, AND THE MAINTENANCE  
OF HONOR. *Cic.*

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PHILADELPHIA:

PRINTED BY ZACHARIAH POULSON, JUNR.

No. 80, CHESNUT STREET.

CALM AFFAIR

PEOPLE



STATE OF A.W.A.R.E.

THE BRITISH MUSEUM

JUSTICE IN THE STATE OF PEACE AND THE MANKY  
OF HONOR.

PHILADELPHIA

PRINTED BY HACHIMARU TONSON  
IN THE CITY OF LONDON

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A  
**CALM APPEAL**

TO THE

**People of the State of Delaware.**

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**W**HEN in the progress of legislation, they, who are amenable to no law, are supposed to have adopted through mistake or error any measures dangerous to private property, or derogatory to national justice, it is not only lawful but laudable in any citizen to make candid animadversions upon them, and by reason and argument to endeavour a reformation and repeal of such acts. Some late resolves and acts passed by the present General Assembly of the state of Delaware, relating to the property of the Penn family have occasioned the following observations. We hope they will be read and considered with the same temper in which they have been written; our view is to undeceive you in the opinion (if such can be entertained) of the justice, policy or probable success of these proceedings, and to give our free advice as to the manner of restoring your national honor and justice, which in this affair have been grievously wounded, to the no small concern of some of the best citizens of the state, and of all its best friends.

After the legal controversy between the Proprietaries of Pennsylvania and the counties of New-castle, Kent and Sussex on Delaware, of the one part, and the Proprietary of Maryland on the other, respecting the title and boundaries of the aforesaid counties, (which had lasted seventy years) had been brought to a conclusion by a decree of Lord Chancellor Hardwick on the fifteenth day of May, 1750; and after the lines between the two provinces had been ascertained by actual mensuration, the Legislatures of each passed acts ratifying and establishing the same. The act of the General Assembly of the Lower counties was passed on the second day of September, 1775. It is beyond all doubt, that the charters or letters patent from Charles the second to James Duke of York, dated March twentieth,

1664,



1664, and June twenty-ninth, 1674, had been always understood to include the territory now making the state of Delaware. This was further elucidated and confirmed by the articles of capitulation signed at New-castle on the first of October, 1664, between Sir Robert Carr and the Burgomasters and all the Dutch and Swedes inhabiting on Delaware-bay and river: and in 1668 by the royal directions, that the government of the country should be *under his royal highness*. From the year 1664 all the lands on the *west* side of Delaware-bay and river were granted by Richard Nichols, Esquire, and after him by Francis Lovelace, Esquire, and then by sir Edmund Andross, under the title of deputy Governor, *under his royal highness the duke of York, of all his territories in America*. Thus it remained till 1682, in which year on the twenty-second day of March, another charter was given by the same king to the same Duke for this tract of country alone, more particularly describing its boundaries; and in the same year the duke had transferred it by two deeds bearing date the twenty-fourth day of August, to William Penn, Esquire; under whom, by divers wills and mesne conveyances, it became legally vested in John Penn, junior, and John Penn, Esquires. By an act of Assembly passed above fifty years ago, when Patrick Gordon, Esquire, was Lieutenant-governor, John, Thomas and Richard Penn, Esquires, the sons of William Penn, were recognized to be "*the absolute Proprietaries of the counties of Newcastle, Kent and Suffex on Delaware*." The same was done during the time of George Thomas, Esquire, as Lieutenant-governor, and repeatedly since down to the late American revolution, under different administrations. Besides all this, the lands have been held peaceably, either by grants from the Proprietaries of Pennsylvania, &c. or of Maryland, for more than one hundred years, without a pretence of claim from any other person in the world. From the second day of September 1775, it must be clear, that the jurisdiction and soil of the whole territory, now, the state of Delaware, was by the agreement and acknowledgment of all persons concerned, and by every legal authority and form, firmly vested in John Penn, junior, and John Penn, Esquires: they were then certainly and to all intents and purposes what they were emphatically called by the Legislature, "*the true and absolute Proprietaries*."

Let us next draw your attention to the public transactions since that time, which can be supposed in any possible way to weaken their title. The American Congress, on the fourth day of July, 1776, declared the thirteen Colonies to be free, sovereign and independent states. The definitive treaty of peace  
between



between the United States of America and his Britannic Majesty was signed on the third day of September, 1783. By the sixth article of this treaty it is expressly stipulated, "That there shall be no future *confiscations* made, nor any *prosecutions* commenced against any person or persons for, or by reason of the part, which he or they may have taken in the present war, and that no person shall on that account, suffer any future loss or damage, either in his person, liberty or property."

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By the sixth article of the constitution of the United States, "all treaties made or which shall be made, under the authority of the United States, shall be the *Supreme law of the land*, and the Judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." And, by the tenth section of the first article of the same constitution, it is ordained and established (among other things) that no state shall pass any *Bill of attainder*, "*ex post facto law*", or law impairing the obligation of contracts."

It may now be proper to enquire, whether any act of Congress or of the state of Delaware has been passed, or any crime or act done by John Penn the younger and John Penn, Esquires, whereby the estate and property of these gentlemen in Delaware have been forfeited, aliened, altered, or impaired since the second of September, 1775, and before the treaty of peace? We know of none. Had any Legislature of Delaware chosen to display their omnipotency to their citizens and to the world, they should have embraced the opportunity, during the war. But then, indeed, the event was in the womb of fate, and the time might have arrived when Messieurs Penns would have loaves and fishes again to distribute. Since the treaty, it is too late; *that* and the parts of the constitution of the United States before cited have opposed a perpetual bar.

The present Proprietaries, still retaining their ancient right to the soil ungranted, and notwithstanding there were arrears of quit-rents and purchase-money due to them for more than fifty years, waited above seven years after the war and until the people were recovered from its disasters, before they attempted to reap any profits from so considerable an estate. A desire to promote the settlement and cultivation of the country and to quiet the minds of the inhabitants, together with a becoming attention to their own interest, induced them on the seventh day of July, 1791, to give a letter of attorney to the subscribers, with full powers for effectuating these purposes. The Attornies in fact, having put their procuration on record in the Rolls-office at Newcastle, wrote to the President of the state, as follows:

Philadelphia,

*Philadelphia, December 22d. 1791.*

S I R,

**T**HE honorable John Penn of Stoke Pogis, in the county of Bucks, Esquire, and the honorable John Penn of Wimpole-street in the parish of St. Mary Le Bow in the county of Middlesex, Esquire, both in the kingdom of Great Britain, Proprietaries of the Delaware state, have constituted us their Attornies in fact; and, among other things, have fully empowered us to sell, and absolutely dispose of, the entirety of all their lands, tenements, rents, hereditaments and estate whatsoever, with their rights, members and appurtenances whatsoever, in fee-simple, either together or in parcels, by public sale or auction, or private contract, unto any person or persons, or bodies corporate or politic, who may be willing to become purchasers.

They have also, from the mutual esteem, respect and regard, which hath at all times heretofore subsisted, as well between their honorable ancestors as themselves and the good people of the former three Lower counties on Delaware and now Delaware state, (as they are pleased to express themselves) authorised us to remit and release all alienation fines, that were in arrear on the second day of September, 1775, and to make composition and agreement respecting the quit-rents and other rents, issues and profits, and the remaining alienation fines, now due to them, or either of them, according to circumstances and our due discretion.

From the tenor of the whole of the powers to us intrusted, we infer, that it would be agreeable to our constituents, and have no doubt it would be so to the citizens of the Delaware state, that all the estate, right, title and interest of the Proprietaries should be first offered for sale to the government.

Under this impression we have deemed it advisable to make this communication to your excellency, previous to any overtures to individuals or others. If the government shall be inclined to treat with us on this business, we shall expect the honor of a notification of it, as soon as circumstances will admit.

We are, Sir,

With great regard,

Your excellency most obedient

And most humble servants,

THO. M'KEAN.

EDMUND PHYSICK.

*His Excellency**The President of the Delaware state.**The*

The President having laid this letter before the Legislature in January, 1792, and no further notice having been taken of it, the Agents on the twenty-third of April wrote again to the President in these words.

*Philadelphia, April 23d. 1792.*

S I R,

**A**S we intend to notify all whom it may concern, that we are ready to grant all the vacant and unappropriated lands in the Delaware state; to confirm by deeds of conveyance the titles of all persons, who have obtained warrants and surveys, or other equitable titles *only* for land under the Proprietaries; and to make composition for quit-rents, alienation fines and monies in arrear and belonging to the said Proprietaries, it has been deemed expedient and respectful to make these communications to your excellency.

It is with deference that we request you to inform us, what may be the wish or expectation of the government respecting the moiety of the rents, issues and profits, that was reserved by James Duke of York, afterwards James the second, king of England, &c. to himself, his heirs and assigns out of the tract of land on Delaware river and bay, beginning twelve miles South from the town of Newcastle, and extending South to the Whorekills otherwise called Cape-Henlopen, by his deed bearing date the twenty-fourth day of August, 1682, to William Penn, Esquire. Notwithstanding a supposition, that the moiety of the rents, issues and profits aforesaid is considered by the government as extinguished by the late revolution for the benefit of the owners of the lands, yet it becomes not us to form the conclusion.

However if your excellency shall not be pleased to instruct us on this subject, or advise the contrary, we shall take it for granted that we are not to meddle with this moiety, and shall therefore proceed to receive that only which belongs to the Proprietaries in their own right.

We have the honor to be,

With sentiments of regard,

Your excellency's most obedient

And most humble servants

THO. M<sup>c</sup>KEAN.

EDMUND PHYSICK.

*His Excellency*

*Joshua Clayton, Esquire.*

Having received no answer, on the fifteenth of August, the following advertisement was published in the Delaware gazette, and in hand-bills.



## Notice is hereby given,

THAT the undersigned, being fully authorized by the Proprietaries, will grant and convey any lands, now vacant and unappropriated in the state of Delaware, at the rate of five pounds sterling an hundred acres and the usual quit-rents, to any person or persons who shall apply for the same, reserving a preference to actual settlers, or to those who have lands adjoining, if such shall make application within three months from this date.

They will also give deeds of confirmation to any person or persons, who have heretofore obtained warrants and surveys, or other equitable titles to lands in the said state under the Proprietaries, on payment of the principal money which shall appear to be due, and interest and quit-rents for nine years preceding the second day of March last.

They will moreover release to any individual all the quit-rents and alienation fines in arrear, and belonging to the Proprietaries prior to the second day of September, 1775, on payment of what shall have accrued since that time until the second of March last, deducting for seven years and an half on account of the general calamity during the late American war. The above terms to continue until the first day of January next.

THO. McKEAN.  
EDMUND PHYSICK.

*Philadelphia, August the fifteenth, 1792.*

In consequence of these fair and liberal propositions, many persons, distinguished for knowledge, probity and property, expressed their approbation of them, and about fifty warrants had been issued for lands not before granted: a considerable number of the inhabitants expressed their intentions of taking out more warrants, and of complying with the payment of the quit-rents on the terms offered, and had the people been permitted to act according to the dictates of their consciences and their interests a murmur of dissatisfaction would not probably have been heard from the great mass of the inhabitants.

The Agents, knowing it would be agreeable to their constituents, and manifestly for the interest of the state, had it always in contemplation to dispose of the entirety to the government, and therefore limited their proposals to the first day of January, 1793; when the new Legislature was to meet at Dover, and when it was reasonably to be expected a committee of both Houses would have been appointed to confer with

with them respecting a purchase. A principal view in the publishing the advertisement was, to secure the inhabitants; in case of such a purchase, from a demand of more purchase-money or quit-rents by the government than the Proprietors had been willing to take: certainly no individual citizen will censure this motive.

After the General Assembly had met, and for months before, some artful and malicious men, in order to inflame the passions of the people against this business, had endeavoured to propagate an opinion, that Mr. M<sup>c</sup>Kean was not now the friend of the people, that he was ungrateful and had accepted this agency from mercenary considerations; that he was in the receipt of five hundred pounds a year from the Penn family to further their projects; and more such calumny. Messieurs Penns put Mr. M<sup>c</sup>Kean's name in the letter of attorney without consulting him, or his least previous knowledge; and he declares, that he has never received a penny, nor the promise of a penny, or any other reward, nor has he ever hinted, that he expected any, for his services on this occasion. His great hope was, that, from the seeming confidence which had been placed in him by both parties, he might be enabled to accomplish the reasonable desires of both, or at least facilitate a composition, and thereby do some good to those he esteemed. Away then with such unfounded suspicions, such injurious slander: You are now informed of his motives for giving himself so much trouble; had he refused the trust, yet there were many to be found, and very probably some of those at present in the opposition, who would have undertaken it. Be all this as it may, let us ask, what have the Agents done, that could possibly offend? Proposals were made to the government and the people; the former has treated them with unprecedented hauteur, the latter with attention and remarkable satisfaction. Have any insidious, secret or improper manœuvres been used? Has not every thing, in personal conversations, as well as in printed publications, been explicit and open? Has there been any precipitancy in this business; nay, has not a whole year been allowed for deliberation? In all this it must be acknowledged no possible offence could have been given. On what foundation then, in law, equity, justice or reason can the proceedings of the Legislature, in this business, have been grounded; what passion of the mind can excuse, or inadvertency apologize for their conduct?

We shall now have recourse to the resolves of the Senate and House of Representatives, as they stand on their Journals. Three have had the *unanimous* concurrence of both Houses; the fourth, though rejected by the Senate,

is curious enough, and may, to a keen observer, afford a clue to the rest. The first is, "That the issuing any warrant for the surveying any vacant or un-appropriated lands in this state, by any person or persons whatever, other than such as may act under the authority of the state, is an usurpation of the sovereignty of the state." Here the words "sovereignty," "warrant," "vacant and unappropriated," must be defined, in order to form a judgment of the truth and soundness of the resolve. The *sovereignty* of a state, we conceive to be, That public authority which commands in civil society; and when it is trusted to a Senate and House of Representatives, they have the sovereignty: in brief, wherever the power of making laws is, there is the sovereignty. A *warrant* is a technical name, for an authority or direction in writing under seal for surveying land; it means no more, and may be given by any person, who has land; it was probably first used in this sense in the American colonies. The word *vacant*, when applied to lands, may be defined, empty, having no possessor or incumbent; and *un-appropriated*, that land, which has not been granted, sold or disposed of by the Proprietors of a larger quantity to any person or persons exclusively: this has been the usual acceptation. Now we should wish to be informed, how the authorizing, by an instrument in writing under seal, a skilful person to survey a parcel of vacant and un-appropriated land, which is intended to be sold, is an usurpation of the sovereignty of the state. It is no legislative act; but a private act between private persons. Where is the law that prohibits it? By the common law every man has a right to do with his own property what he pleases, provided he does not hurt another; and, it is certain, no positive law has been made against it, nor will any enlightened and free government ever pass such an act; for it would be an unwarrantable restraint upon the alienation or use of real property, it would be a wanton abridgement of the liberty and rights of the people. Besides, if the laws of the state authorize any man, who has a title to lands, to have them surveyed under such kind of warrants or otherwise, does "he not act under the authority of the state?"

The second is, "That it is the sense of the two Houses, that no Surveyor in this state ought, or legally can, execute any warrant issued in the name of any person not authorized by this state for that purpose." The plain sense of which is, that no person can by the laws of Delaware, survey any land whatsoever, unless he has a warrant from a person commissioned under the state for that purpose: it is not confined



confined to vacant, un-appropriated or any certain species of land. Suppose a man, having ever so good a title to lands in Delaware, desires to know the metes, boundaries and quantity of them, or of a parcel of them, for the purpose of sale or otherwise, he cannot employ any person in the state to survey it for him under his own authority, until he first obtains a warrant from some person commissioned by the state. Perhaps the illegality consists in acting under a *written instrument sealed*, but it may be surveyed under *verbal directions only*. The two Houses have not been pleased to assign any reasons for this opinion, and it is difficult to guess at any. Although the Proprietors had formerly given letters of attorney from time to time to three or more private persons to dispose of, and give titles for, their lands, who were commonly called Commissioners of Property; yet for the last forty years the Lieutenant-governors signed and sealed all warrants and patents. It may possibly have been imagined from this circumstance, that warrants and patents were documents of state, and that none but Governors or persons having the royal authority could issue them. However, the fact is directly otherwise, for the Governors or Lieutenant-governors had no power by their commissions to interfere with the lands; on the contrary, they were therein prohibited, expressly, from intermeddling with them. The Proprietors always gave those who did, a letter of attorney for the purpose, and nearly the same in substance, though not so ample, with that given to the present Agents; by the authority of which alone, as any private persons might, they acted. None of these Attornies in fact acted under the solemnity of an oath or affirmation; nor did any of the persons under them, as Surveyors or otherwise. Indeed, as some might have doubted whether fees, for services rendered by them concerning the lands, could lawfully be exacted upon the people, or taken otherwise than by consent; or because they were deemed too high, acts of Assembly were obtained for their regulation. The Agents thus appointed acted as persons in the like trust do every where; they sold and conveyed the real estate of the Proprietors in such quantities, at such prices and in such manner as their constituents from time to time instructed and directed them.

The third resolve is, "That it be recommended to the citizens of this state to take up no warrants, and to accept of no patents or deeds whatever, from John Penn the younger and John Penn, or either of them, or their Agents or Attornies." As this is no more than a *recommendation*, no objections can be made to it on the score of illegality, though there

there may be some respecting its policy. Why should the citizens of the state be advised not to purchase lands, or receive conveyances for what they have bought, from Messieurs Penns? Is it politic, to prevent the cultivation of the soil, and rendering it more useful to society? Can it be friendly to the citizens, to suffer foreigners to buy all these lands at five pounds sterling for a hundred acres, when they, in general, are worth five times as much; or does it appear to be for the interest of the possessors or occupiers of land under a precarious title, to prevent them from obtaining a legal and good one; and when, by the procuring of such, for a mere trifling consideration, their lands would immediately sell for more than fifty pounds per centum in advance?

The resolves, however, are only the *speculative opinions* of the two Houses; we shall next have recourse to their acts, which have an *obligatory* operation, provided they are *constitutional*. The first is entitled, "An act concerning vacant and uncultivated lands," and passed on the second day of February last. The preamble recites, "Whereas the minds of the good people of this state are much alarmed and disquieted by warrants for surveying lands being issued, without the authority of the state; and it appears the peace thereof will be greatly disturbed by such proceeding; therefore, for preventing the evil consequences thereof, Be it enacted, &c." What reason has been, or can be assigned for the *good* people of the state being so alarmed? *Good* men love justice, they will render to every one his own, and will not be alarmed, because a person, before he conveys his land, has taken the necessary and usual preparatory step to ascertain its description and quantity: nor will they be alarmed at any thing that is lawful and innocent. No violence, no breach of the peace, no menace or disturbance whatsoever has attended the issuing warrants. How then will the peace of the state be greatly disturbed by such proceeding, or what has occasioned such an alarm as required legislative interposition? Though such a proceeding has been carried on publicly and with little intermission for one hundred years in Delaware, yet none of the people either good or bad have before ever been alarmed at it, or discovered its evil consequences. But the act goes further than that which occasioned the alarm among the good people; that was at *warrants* being issued, but this makes it highly penal for an inhabitant of the state not only to receive warrants, but also to receive *surveys or grants, deeds, &c.* from any person not acting under the authority of the state, for vacant and uncultivated lands within the state, &c. It is true, the act nar-

rows the design of the third resolve, and confines surveys and deeds to lands for which warrants had issued since the fourth day of July, 1776, but even this will be found equally unsupported by principle. If the good people in Delaware were called upon to pay all arrearages of quit-rents or all their other just debts, it probably would create a greater alarm, and yet we cannot be persuaded, the Legislature have the right to make a law to cancel them; it would be "a law impairing the obligation of contracts," it would be unconstitutional, an act of mere power, and therefore void. Unfounded and unjust alarms ought not in this way to be regarded. Men, who respect property, tranquility and peace, will use all honest means to preserve them: they will endeavour to enlighten the ignorant, to calm the passions of the violent, and by their advice, influence and example direct them into the paths of justice, and social duty.

Hitherto the design of the Legislature seems to be involved in a studied obscurity, but the last act explains the whole. The title is, "An act for opening and establishing a Land-office within this state, and for the sale of all vacant and uncultivated lands therein." It passed on the nineteenth day of June last, though it had not been seen by either of us till the twenty-seventh of August. We shall not descend to particular strictures on this act; but cannot avoid remarking, that, by the eleventh section, it is enacted, "that the titles to any lands held under any grant, warrant, survey, re-survey or patent made or issued between the first of January, 1776, and the first of January, 1792, shall be good and available in law and equity." Now it is notorious that no warrant, survey, re-survey, grant or patent had issued in Delaware during this period, but by the present Messieurs Penns or their Agents. Why are they declared to be *good in law and equity*, and not those issued since? How did they lose their estate on that day, or the power of conveying it to others? This must appear mysterious to most men. There was perhaps a latent reason; but we shall not, at present, suggest it, for we mean not to irritate.

By this act it appears, the whole of the real estate of the Penn-family is *assumed* (we will not use the word "usurped") as *public property*, and belonging to the state. Let us examine their pretensions to it. A nation can acquire public property, by taking possession of an uninhabited and desert country, by purchase, donation, conquest, cession or forfeiture, and in no other way. On which of these titles then, will the state of Delaware rest its claim? None of the four, first enumerated, will be relied on. If under that of cession, how can it be maintained?



tained? In 1775, a war had been waged between Great Britain and the United Colonies of America; it terminated in 1783; when by a treaty of peace his Britannic majesty ceded to the *United States* (as they had been declared to be independent by Congress in 1776) "the government, propriety and territorial rights of the same." This cession could amount to no more than the right he had to the country, all the claims of the *crown*, the *high domain* of the British nation; it cannot pass the *useful domain*, nor the rights of any of his subjects, that were separate and distinct from the *empire*. The people of Delaware thereby acquired the government of the territory and the moiety of the quit-rents, that had been reserved by James Duke of York: the last were all the propriety and territorial rights belonging to the crown of Britain in Delaware, and of course no more could possibly be ceded to the United States, or to Delaware; for no one can give what he has not. If it shall be claimed as a forfeiture, the crime should have been alledged, the record of the conviction and attainder mentioned, and the law shewn, whereby the forfeiture was incurred. The younger Mr. Penn, who owns three fourths of the estate, was an infant during the war, and had never been in the United States until after the peace; the other gentleman, it is well known, had taken the oath of allegiance to the state of Pennsylvania, and was a citizen to all intents and purposes many years before the treaty of peace. Did these circumstances work a forfeiture of their estates? The state, therefore, cannot bolster up a title on any of these foundations. The fourth of July, 1776, is mentioned in the first act, as if some reliance was had on the declaration of independence. By that public act, all authority under the crown of Great Britain ceased: but how it gave the people of Delaware a title to the lands of Messieurs Penns, more than to those of any other individuals in the state, we cannot divine. Some kind of hocus pocus or legerdemain must have brought it about.

It is no uncommon thing for the proprietorship of the territory to be distinct from its government. The Duke of Athol, in 1765, enjoyed the government, customs and territorial property of the Isle of Man; in that year he sold the two former to the crown of Great Britain for seventy thousand pounds sterling, but retains the latter. To come nearer home, the Proprietors of East and West New-Jersey held both the government and soil until 1702, when they surrendered the government to Queen Anne; but retained the territory, and in all their warrants, surveys and grants,

grants, as well as in conversation, they are called the *Proprietors* of New-Jersey, to this day: Richard Penn, Esquire, is one of them. And yet some well-disposed men were taught to believe, that calling Messrs. Penns "the Proprietaries," in warrants, &c. was an usurpation of the sovereignty of the state, though there is to be sure no resolve to that purpose. It is strange, that this instance, in a neighbouring state, had not been recollected.

It has been said, that Mr. M-Kean, in 1779, when, in the character of Chief Justice of Pennsylvania, he gave answers to several questions proposed to him by the Legislature, respecting the territorial rights of that state, held principles and opinions very different from what he now expresses. Nothing can be more foreign to the fact; the publication of these answers will best establish the truth; they are as follow:

" *In the General Assembly of Pennsylvania,*

" *Tuesday, March thirtieth, 1779.*

" The answers of the Chief Justice to the questions propounded to him on the twenty-seventh of March last, were read; and thereupon, ordered, that they be printed in the German and English newspapers, together with the said questions, and the report of the committee on the claims of the late Proprietaries.

" *Extract from the Minutes,*

" JOHN MORRIS, JUNR.

" *Clerk of the General Assembly.*"

The questions proposed to the Chief Justice were the following:

" I. Had Charles the second, King of England, authority to convey the lands described in the Charter of Pennsylvania?"

" II. Was the grant to William Penn an absolute one, or is he and his representatives to be considered as Trustees, and in what manner?"

" III. Is the operation of the concessions to be confined to the original purchasers, who were parties to it, or is it to be taken as a general and binding agreement on William Penn and his heirs, of which all subsequent purchasers were to claim benefit?"

" IV. If the latter,—Then whether, by the said concessions, the said William Penn had a right to the tenths of the lands, as well as purchase-money and quit-rents, from the

the first purchasers; and whether the said concessions restrained him from reserving a tenth, as purchases were made from the Indians, and from selling the rest on such terms as the purchasers and he should agree on?"

" V. Are the quit-rents to be considered as a provision for the support of government, or are they to be considered as reservations, resulting from the nature of the estate which William Penn had in the soil, and were they legally reserved?"

" VI. Had the heirs of William Penn the right of pre-emption of all lands within the boundaries of the state, and yet unpurchased from the Indians; or did he lose that with the right of government?"

The answer of the Chief Justice is as follows:

It is with the utmost reluctance I undertake to answer the questions propounded to me by the honorable the House of Assembly, on account of my being a member of the General Assembly of the Delaware state, where some of the like nature will probably be soon agitated; also, because I cannot have the benefit of consulting my brother Judges; but more particularly on account of the vast magnitude of the subject, the short time allowed to me, and my great diffidence of my own abilities: however, as it is the request of the House, I shall waive every other consideration, and give the best answers in my power.

#### *Answer to the first Question.*

It seems to have been the law of nations, that whatever *vacant, waste or uncultivated* country is *discovered*, shall belong to that prince who had been at the *charge of the discovery*. Henry the seventh, on the fifth of March, in the eleventh year of his reign, had commissioned John Cabot and his three sons to sail in quest of unknown lands, and to annex them to the crown of England, with this clause, *which before this time have been unknown to all Christians*. This John Cabot, with his son Sebastian, in their second voyage, in the year 1497, are said first to have discovered that part of America, which lies on the north-east of the continent, from the south of Labrador as far as Cape Florida. Henry Hudson, an Englishman, in the year 1608, under a commission from King James, the first, discovered more particularly Long-Island, New-York and the river which still bears his name, and also *Delaware bay*, and afterwards sold his right to the Dutch, who settled on each side of the Delaware, and in the year 1623, erected a fort on the east-side called *Nassau*. The Swedes appear to have taken possession of the south-side of Delaware



Delaware in 1638, and to have held it under Peter Minist, Governor under the Queen of Sweden, until 1651, when the Dutch built fort Casimir, now Newcastle. Ryssingh, the then Governor, under Christina Queen of Sweden, afterwards retook Casimir; but his successor Suen Stutz surrendered it and the country to Stuyvesant, the Dutch Governor of New-York, &c. the sixteenth of September 1655, on articles of capitulation. From this time the south-side of Delaware was held by the Dutch until the first of October 1664, when it was surrendered to Sir Robert Carr, for his royal highness James Duke of York, &c. on articles of capitulation. A war broke out with the States General in 1672, and the latter retook the whole country in August, 1673, but there was a treaty of peace at Westminster on the ninth of February, 1674, by the sixth article of which the whole was again restored to the English. The Duke of York, to remove all controversy respecting his property, obtained a new patent from King Charles the second, dated the twenty-ninth of June, 1674, for all the lands contained in his first grant of the twelfth of March, 1664. The Dutch had, during the time they governed the country, purchased large tracts of land from the Indian Proprietors; and their Directors and Deputy-Directors, as well as the Governors, Deputy-Governors and the county courts, under the Duke of York, had granted considerable quantities of land to the inhabitants of the south-side of Delaware as far up the river as Upland, now called Chester, and above it, reserving a quit-rent of a bushel of wheat for every hundred acres, before the date of the royal charter for Pennsylvania to William Penn, Esquire.

At the time of the grant of Pennsylvania, to wit, on the fourth of March, 1681, (New Style) the lands therein contained do not appear to have been claimed by or under any power in Europe, except the King of England.

These facts seem necessary to be stated previous to a direct answer to the question.

Under these circumstances then, I think, Charles the second had (*jure coronæ*) authority to convey the lands described in the charter of Pennsylvania, excepting such parts as he had before granted to the Duke of York, or were held under him, *or by or under the Indian Proprietors*; these exceptions must be allowed, unless the absurd doctrine, that Pagans or Heathens had no right to any lands, is admitted; but the words of the charter, in the preamble, *not yet cultivated or planted, omitting by any Christians*, imply a contrary opinion both in grantor and grantee.

*Answer to the second Question.*

It rather appears to me, that the grant to William Penn is an *absolute one*; in favour of which opinion the seventeenth section of the charter (to mention no other) seems to be very strong and pointed. The interest of the grantee and his heirs seems to have been so connected with the settlement of the province and the enlarging the English empire, raising useful commodities, &c. that the first could not be much promoted without the latter; and all grants of this kind, which have come to my knowledge, particularly that to John Lord Berkeley and Sir George Carteret for Nova Caesaria, or New-Jersey, and that to Lord Baltimore for Maryland, appear to have been absolute, and intended for the benefit, and to advance the fortunes, of the grantees, and their heirs.

*Answer to the third Question.*

The clearest construction I can form of the conditions or concessions, dated the eleventh of July, 1681, is, that they were confined to the adventurers and purchasers *at that time*. This construction is founded not only on the title of the conditions, &c. which are said to be agreed upon by the Proprietary and Governor *and those who are the adventurers, &c.* in the present tense, but from the natural import of several of the articles thereof.

*Answer to the fourth Question.*

Though more than one Assembly have insinuated, or asserted, that the quit-rents were intended for the support of government, yet as this is not evidenced by any law, or instrument in writing or act whatsoever, assented to by William Penn, Esquire, the first Proprietor, nor by any of his heirs; as nothing of the sort is mentioned in any of the deeds or patents, wherein the same are reserved; as they have never been applied to that use for near a century, but always received, and considered as private property; and as all the other Proprietaries in America, under charters of the like kind, have reserved, received and appropriated the quit-rents to their own private uses, I am of opinion, that these quit-rents are to be considered at this day as reservations resulting from the nature of the estate, which William Penn had in the soil, and that as lord mesne he could legally reserve them.

*Answer to the last Question.*

Many historians and writers, on this subject, have been of opinion, that a charter or grant like that for Pennsylvania, gave

gave a right of pre-emption to the grantee, and was good against all persons but the Indian or native Proprietors and occupiers. Indeed it seems to have been necessary for the public weal, that this right should be vested in the person or persons who had the government of the country; the holding treaties with independent princes or nations for any purpose whatsoever being an act of sovereignty, and the greatest danger of an Indian war being to be apprehended from the frauds and injustice which private persons might be tempted to commit, were they permitted to purchase as they pleased: besides, to prevent their frequently selling the same lands, and many other causes of controversy, it is expedient, that the bargain with Indians should be made by the rulers of the state, and that it should be attended with considerable solemnity. For these or such reasons this right might be supposed to be granted to William Penn, Esquire, by the charter, as he was vested with the whole of the executive and a moiety of the legislative power over all English subjects within the limits of the then province. Be that as it may, an exclusive right of purchasing land from the natives was granted to him by act of Assembly, 1705. But, upon the whole, as every power of government in the heirs of William Penn ceased by the late revolution, I rather think that they have no right of *pre-emption; or of purchasing at all from the Indian nations, in future*, any lands lying within the boundaries of Pennsylvania, but that the same, for the reasons above, belong to the state.

This opinion is to be considered by the honorable House in a *legal* not in a *political* light. And it is to be hoped they will receive it with candor, and excuse any inaccuracies, when they are pleased to reflect, that I have had but *one day* to digest and write it.

THOMAS M'KEAN.

*Philadelphia, March 29th. 1779.*

*The honorable the House of Assembly  
of the commonwealth of Pennsylvania.*

In the month of November following, the General Assembly granted to the Proprietaries one hundred and thirty thousand pounds sterling; and confirmed their titles to all their separate and private estates, and also to all their tenths or manors, with the quit-rents in arrear and to become due therefor; and, for reasons assigned in their act, vested the residue in the commonwealth. The above sum of money, together with *lawful interest*, has since been paid to them.

Acts of the General Assembly may have all the *forms* and yet not the *validity* of laws. We conceive this to be the situation



ation of the acts we remonstrate against; for the following reasons: First, They militate with the letter and spirit of the article in the treaty of peace, quoted in the beginning, which is part of the supreme law of the land, and supervenes all other laws. Secondly, They are repugnant to the tenth section of the first article of the constitution of the United States also quoted, for they operate as, and in fact are, Bills of attainder, and *ex post facto* laws. It is true no crime has been alleged, but so much the more unconstitutional; for if the Messrs. Penns, or any persons whatsoever, cannot be deprived of their property, for even the greatest crime against the state, by any act of the *Legislature*, a fortiori they cannot, when none has been committed. Thirdly, They are contrary to the provision in the eighth section of the first article of the constitution of the state of Delaware, viz. "nor shall any man's property be taken or applied to *public use*, without the consent of his representatives, and *without compensation being made*." This particular, among other things, is reserved out of the general powers of government. What particular and necessary use had the public for the property of these gentlemen, more than for what belongs to any of the members of the two Houses? And where is the compensation? And lastly, they may not improperly be considered as contrary to natural *equity*, and therefore void. Acts of parliament in England against natural equity have always been adjudged void, and an instance given is, *as where it makes a man a judge in his own cause*.\* Now the Senate and House of Representatives of Delaware have assumed the right of being the sole and absolute judges in their own cause against John Penn, junior, and John Penn; every member will acquire his proportion of all the estate thus taken from *them*. Besides, there has been no trial or hearing, nor citation or notice of any kind for that purpose; which is contrary to *natural justice*.† Though the *justice* of despots is generally regulated by their *power*; yet we find that two of the greatest in Europe, the Empress of Russia and the King of Prussia, in their usurpation of the Polish territory, have taken only a part, and have left the good Stanislaus the residue; but the Legislators for Delaware have taken the whole from the Proprietors. Their estate is as much *private property* as any in the state, nor do we believe that a single reason can be assigned for the assuming it as *public property*, which will not apply with equal force for taking the lands of any member of the General Assembly or other citizen.

\* Hobart 87. 8 Co. 118—12 Mod. 687.

† 1. Hawk. 154.

citizen. Is this precedent consistent with the liberty, the property, or the safety of the people? Will it not be dangerous in every point of view? May it not be as fatal to those who are at the head of it, and to their families, as to those who now suffer? It is a bad example to the inferior tribunals, as well as to private persons. Though the morality of Princes is not, in their own estimation, thought to be so confined as that of their subjects, yet we have never heard of such a distinction in republics. No reason of state should govern its policy against the strict rule of justice. You should do unto others what you would wish should be done unto you, in the like circumstances and on the like occasion; for this is the law and the prophets.

Were the state of Delaware, or the citizens individually to have paid the Proprietors the monies agreed to be accepted, the whole would not perhaps amount to more than the sum they and their ancestors have expended in a seventy years litigation, to secure the title, ascertain the boundaries and facilitate the settlement of the country: Suppose them to have acted as mere Factors or Agents, and for the exclusive benefit of the inhabitants of Delaware, they have a right in *conscience* to the re-imbursment of all the expences they have incurred, and also satisfaction for their time and trouble. If Messieurs Penns shall be compelled to seek for justice in the legal tribunals; the actions, whether against the state or individuals, at law or in equity, must be commenced in the courts of the United States; and if tried according to the course of the common law, the juries must come from a neighbouring circuit or district. An impartial trial cannot otherwise be had, for all the Judges and Jurors in Delaware will have virtually declared their sentiments before hand. This is another consequence of the acts, that have been passed.

Mr. McKean had told some members of the Legislature as well as others, that he did not incline to use coercive measures nor involve his constituents or himself in law-suits; but, if any gentleman desired it, he would indulge him by commencing an action against him, either for the arrearages of quit-rents or for lands remaining unfold, and have the matter judicially determined; but in such case he would insist upon having whatever might be so recovered. Further than this he did not wish to go, in a friendly office. However, the Agents will agree to enter into an amicable suit in the Supreme Court of the United States, and on a case stated, submit the title to the vacant and ungranted lands to the opinion of the Judges; or refer it to five Judges of the States, or to five gentlemen learned in the law, to be mutually

mutually chosen; and that their report shall be final. Will not this be more eligible and honorable than actions and litigations without end? The costs of a suit against each citizen, nay, the Lawyers' fees only, would amount to more than the sum of money that has been asked for the purchase-money of an hundred acres. Why have the Legislature interposed to hinder any person from purchasing from the proprietors, by making it highly penal to do so? If they have no title, they can give none; but if any of the citizens prefer *their* title to that of the *state*, why not suffer them to take it? Volenti non fit injuria, no injury is done to the willing, and to him who acts with a full knowledge of all circumstances. Or if their right is a good one, it is a matter of conscience not to withhold or to invade it.

We have now given you our sentiments, as concisely as possible, respecting the late resolves and acts of your present Representatives; their justice, policy and probable success. To conclude, let us persuade you, that it is for the honor and interest of the state, either to come to an agreement with Messrs. Penns for their inheritance in Delaware, or to tolerate the conscientious citizens to do so, each for himself. Property thus acquired will sit more easy and be more durable, than if even *secured by a mere act of power*: it will be enjoyed with more public and private reputation, as well as mental comfort to the possessor. At the ensuing election, we hope you will choose for your Representatives some of the wisest, most disinterested and virtuous men in the several counties; men, who fear God and eschew evil: in fine, procure a repeal of the injurious acts; for it would be inglorious for a sovereign state to treat with private gentlemen, when in chains or under duress. We trust the event will prove, that the people in Delaware will not be made stalking-horses, that they will prefer justice to paltry interest, and be perfectly convinced, that *honesty is the best policy*.

THO. M<sup>c</sup>KEAN,  
EDMUND PHYSICK.

Philadelphia, September 3d. 1793.

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